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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. **517**

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN
ASSOCIATIONS, ET AL., *Petitioners* "

v.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

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The National Board of the Young Men's Christian Association and other petitioners herein pray that a writ of certiorari issue to review a judgment of the United States Court of Claims entered in the above-captioned case on June 14, 1968.

OPINIONS BELOW

The opinion of the Court of Claims (App. *infra* pp. 1a-19a) is reported at 396 F. 2d 467.

JURISDICTION

The judgment of the Court of Claims was entered on June 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the United States' obligation to pay just compensation under the Fifth Amendment is suspended during peacetime confrontations between U.S. military forces and private citizens.

2. Whether *United States v. Caltex* ought to be overruled.

STATEMENT

This is a claim for just compensation under the Fifth Amendment to the United States Constitution arising out of the U.S. Army's seizure and use of petitioners' real property during the Panamanian riots of 1964. The basic facts are not in dispute.¹ Petitioners² own and occupy buildings located on the Atlantic side of the isthmus just inside the zone on the street which forms the boundary line at that point with the Republic of Panama. On the evening of January 9, 1964, U.S. Army troops cleared the area of rioters and took up positions in front of petitioners' buildings. After receiving sniper fire from the Pana-

¹ The parties stipulated below that the official U.S. oral and written presentations before the Organization of American States concerning the events in question, constitute an accurate recital of the pivotal facts. These statements were further amplified in a letter from the General Counsel of the Army to petitioners' counsel which was included in the stipulation.

² The YMCA and Masonic Temple are joined by the YMCA's property insurer, the Commerce and Industrial Insurance Company, which paid a portion of the total loss.

manian side of the border, the troops withdrew into petitioners' buildings to "protect" themselves from further assault and establish necessary defensive positions. (App. pp. 4a, 18a-19a).

The rioters responded with a series of Molotov cocktail attacks against the YMCA where the bulk of the troops were located. The mob finally succeeded in setting the YMCA on fire on the afternoon of January 10, and the troops were forced to withdraw. (App. p. 4a) The rioters then turned to the Masonic Temple but were unable to set the building on fire because of a difference in construction. Consequently the Army was able to maintain an observation post on top of the Masonic Temple throughout the period from January 9 through the cessation of disturbances on January 12, 1964. (*Id.*) During this time, U.S. forces were under strict orders not to fire upon the rioters under any circumstances until the afternoon of January 11, when certain trained marksmen were allowed to return selected fire against known snipers only.

Following the riots, the Army inspected the petitioners' buildings and ordered them altered to provide further fortification in the event of future riots.

Petitioners filed administrative claims with the Department of Army under 10 U.S.C. § 2733 which were duly denied whereupon they filed the instant action in the Court of Claims seeking just compensation under the Fifth Amendment. The Government entered a general denial, and the matter was submitted to the court on cross-motions for summary judgment, based on stipulated facts.

The Court of Claims, Judge Davis dissenting in part, held that the Government was not obligated under the

Fifth Amendment to pay just compensation for property which was "temporarily" taken and used by U.S. military forces in the presence of an "immediate danger"—even if that danger occurred in time of peace, not war. The majority also rejected petitioners' claim for damages arising out of the subsequent alteration of their property, finding that they had consented to the taking.

Judge Davis dissented from the first holding on the ground that "there is no exception from liability for temporary seizures for military use in the face of imminent hostility or to meet an emergency; once the property is taken for a military use, the Government is responsible for its subsequent injury, no matter how quickly that follows the seizure." (App. pp. 16a-17a).

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case for two reasons: First, the decision below represents a far-reaching extension of the questionable, but limited, exception to the Fifth Amendment established in *U.S. v. Caltex*, 344 U.S. 149 (1952). Second, the instant case demonstrates that it is time to review *Caltex* itself, to determine whether its holding and rationale have any relevance to the problems and demands of today's world.

1. In *United States v. Caltex*, this Court held, Justices Douglas and Black dissenting, that the U.S. was not obligated under the Fifth Amendment to pay compensation for Philippine oil storage facilities deliberately blown up by U.S. forces to prevent them from falling into the hands of invading Japanese armies. The rationale was that the Government ought to be able

to freely destroy strategic property without regard to ultimate liability when faced with immediate danger of seizure by enemy forces. The majority was quite careful to limit its holding to the situation where property was seized and deliberately destroyed; as opposed to the situation, as here, where property is seized and used but not deliberately destroyed by U.S. forces.³

The basis for this somewhat illogical distinction was the divergence of prior caselaw in which this Court found liability under the Fifth Amendment for seizure and use in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) and *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871) but denied claims for losses resulting from seizure and deliberate destruction in *United States v. Pacific Railroad*, 120 U.S. 227 (1887).

The decision below extends the *Caltex* holding in two fundamental ways. First it applies the criterion of "immediate danger" to a peacetime confrontation between U.S. military forces and groups of citizens. Second, it no longer limits the military's tolerable ac-

³ In *U.S. v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), Justice Harlan characterized the holding in *Caltex* as follows:

Except in the extraordinary situation where private property is destroyed by American armed forces to meet the exigencies of the military situation in a theatre of war, see *United States v. Caltex, Inc.*, 344 U.S. 149, 97 L.ed. 157, 73 S.Ct. 200, no case in this Court has held that the Government is excused from providing compensation when property has been 'taken' from its owners during wartime in the interest of the common good. (Emphasis added)

The majority in *Eureka* found that there had not been a taking because, *infer alia*, "it is clear from the record that the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." 357 U.S. at 165-66.

tions to deliberate destructions or "denial takings," but rather extends the cloak of immunity to any seizure and use of real or personal property by U.S. forces so long as they are confronted with an "immediate danger."

The first extension is beyond any suggestion or working premise of the majority in *Caltex*. From the very beginning the question of governmental liability for actions of military forces has been raised only in the context of open armed hostilities involving organized powers on both sides.⁴ To date no other court or writer has suggested that the traditional rules somehow apply in peacetime domestic riots. The second extension is squarely contrary to the *Caltex* majority's clear distinction between seizure and use on one hand and seizure and deliberate destruction on the other, coupled with its unmistakable intent to limit its holding to the latter.

The necessary effect of these rulings is that the Government is now virtually immune from liability under the Fifth Amendment for the actions of U.S. forces in any past, present or future riot involving intense confrontations between federal troops and aroused citizens. So long as an "immediate danger" is present, the troops can, under the present holding, seize and use property on a "temporary" basis without incurring liability for any loss which might occur during that

⁴ See III Whiteman, *op. cit. supra* at p. 1734; Vattel, *Law of Nations*, Bk III, c. XV, § 232 (1760). See also Wolff, *The Science Method of War*, § 830, the *Classics of International Law* No. 13, Vol. II (1934 ed.); Borchard, *Diplomatic Protection of Citizens Abroad* (1915) pp. 262-264, and Wormser, *Collection of International War Damage Claims* (1944) p. 157.

⁵ See also authorities cited in footnote 5 of Judge Davis' dissenting opinion below (App. p. 16a).

use. Such a "danger" will be inevitably present or potentially present whenever the situation reaches the point where federal troops must be called in.

By any standards this is an extraordinary result. We believe it is visably at odds with the basic philosophy of the Fifth Amendment discussed below. At the very minimum, it presents a real and substantial need for determining whether such a conflict exists; a need that is underscored by the urgency and increasing frequency of the confrontations in which the issue arises. Resolution of this vital issue ought not to be left to a lower court—the only court likely to consider the question in view of the Court of Claims jurisdiction over Fifth Amendment claims in excess of \$10,000. This issue ought to be resolved by this Court and resolved now.

2. An equally basic reason for review is the *Caltex* decision itself. In our view it is manifestly wrong and ought to be reversed. Its underlying assumption that the Government must be able to seize and destroy property in time of war without regard to the niceties of compensation at a later date is essentially foreign to the basic concept of the Fifth Amendment and its guarantee of the use and enjoyment of private property. The proper philosophy was expressed by Justice Douglas dissenting in *Caltex* with Justice Black [344 U.S. at 156]:

I have no doubt that the military had authority to select this particular property for destruction. But whatever the weight of authority may be, I believe that the Fifth Amendment requires compensation for the taking. The property was destroyed, not because it was in the nature of a public nuisance, but because its destruction was

deemed necessary to help win the war. It was as clearly appropriated to that end as animals, food, and supplies requisitioned for the defense effort. As the Court says, the destruction of this property deprives the enemy of a valuable logistic weapon.

It seems to me that the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

We believe that the "guiding principle" enunciated by Justice Douglas is and should be the guiding principle today. Its essential forthrightness and soundness are as valid today as they were in 1952 or at the time of the adoption of the Fifth Amendment.

The decision below rejects that principle in favor of a somewhat limited view of the Government's responsibility. It correctly asserts that the Government has a duty to protect the public in general and that this duty includes the seizure and use of private property when necessary. But this is not and never has been the true issue. Rather the question is who pays for losses arising out of or occurring during that seizure and public use.

One alternative, that chosen by the court below, is to place the burden on those least equipped by location and fortune to bear the loss. The other, as expressed by Justices Douglas and Black in *Caltex* and Judge Davis below, is to distribute the cost to the public as a whole where the property is seized and actively utilized for the common good. This case affords a signal and significant opportunity for rejecting the former and strengthening the latter.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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